

ZASHIN & RICH

Ernst & Young Tower | 950 Main Avenue, 4th Floor | Cleveland, Ohio 44113 | p: 216 696 4441 | f: 216 696 1618 | zrlaw.com



Stephen S. Zashin
OSBA Certified Specialist in
Labor and Employment Law
ssz@zrlaw.com

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VIA ECF AND EMAIL (sullivanysdchambers@nysd.uscourts.gov)

Honorable Richard J. Sullivan
United States District Court, Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square, Room 2104
Courtroom 905
New York, NY 10007

**RE: *David Lane Johnson v. National Football League Players Association, et al.*
Case No. 17-cv-5131 (RJS)**

Dear Judge Sullivan:

In the NFLPA's October 19, 2018 letter to this Court (Dkt. No. 128), the NFLPA objects to Mr. Johnson purportedly withholding information from the NFLPA necessary to alter and defend its position. Oh, the irony. For more than two years, Mr. Johnson has raised precisely this same objection. Furthermore, Mr. Johnson did not withhold anything from the NFLPA. Meanwhile, the NFLPA, in violation of the Labor Management Reporting and Disclosure Act ("LMRDA"), continues to withhold from Mr. Johnson a complete copy of the Policy on Performance Enhancing Substances 2015 ("2015 Policy").

With its October 19 letter, the NFLPA failed to provide this Court the entirety of the relevant email exchange between counsel. That exchange (not including attachments) is attached as Exhibit 1 and demonstrates that, if the NFLPA was at all prejudiced by any delay in reviewing Mr. Johnson's portion of the joint letter, the NFLPA caused the prejudice by failing to provide the NFLPA's portion of the joint letter until 4:26 p.m. on the day the letter was due. The full email exchange demonstrates Mr. Johnson offered to discuss his position over the phone and provided his proposed next steps to the NFLPA before submitting anything to the Court. For the NFLPA to suggest that it had "just minutes" to review Mr. Johnson's position is disingenuous.

Regarding the substantive arguments in the NFLPA's October 19 letter, Mr. Johnson cited cases applying the LMRDA's civil enforcement mechanism 29 U.S.C. 412, which applies to claims under Title I of the LMRDA, including both Mr. Johnson's claim for failure to provide him a complete copy of the 2015 Policy and his claim for retaliation for asserting his rights under the LMRDA. See Dkt. No. 39 at ¶¶ 287, 304-315. The NFLPA has never addressed Mr. Johnson's retaliation claim. Its refusal to do so does not remove the claim from the pleadings.

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Additionally, the NFLPA still has not provided Mr. Johnson a complete copy of the 2015 Policy and has never provided any sworn statement regarding the numerous deviations and modifications to the 2015 Policy. For example, regarding the 2015 Policy requirement that there be three to five arbitrators, when speaking about the 2015 Policy's sister policy (the Policy and Program on Substances of Abuse), the NFLPA's counsel told another federal court that:

The parties to the CBA—the NFL and the NFLPA—mutually consented to modify their agreement and not appoint a third arbitrator because there are simply not enough appeal hearings under the Policy to justify having three arbitrators in rotation.

See attached NFLPA “Position Statement [Corrected]” at 2 (Exhibit 2); see *also* excerpts of transcript from conference before the Honorable Judge Adams in the U.S. District Court for the Northern District of Ohio at 12:6-14:20 (as of December 2016, NFLPA unsure whether modification allowing only two arbitrators was in writing but that the modification has applied to both the Policy and Program on Substances of Abuse and the subject 2015 Policy “for a couple of years”) (Exhibit 3). Furthermore, a number of other provisions from the 2015 Policy remain undisclosed. To name just a few, the following is a non-exhaustive list of core provisions, amendments, and deviations to the 2015 Policy that the NFLPA has never provided Mr. Johnson:

- The “understanding” as to the two-year provision under which the NFL Defendants disciplined Mr. Johnson, as allegedly presented by Dr. Lombardo;
- The collection procedures and testing protocols referenced in the 2015 Policy, which are part of the 2015 Policy such that the LMRDA requires the NFLPA to produce them upon request by a union member affected by them – like Mr. Johnson; and
- Any amendment to the 2015 Policy regarding replacing the Chief Forensic Toxicologist.

The LMRDA requires that the NFLPA keep a written statement of any terms arrived at orally or in writing. Assuming the NFLPA even has such a writing, it has never shared this writing with Mr. Johnson. Thus, to the extent the NFLPA claims it has provided Mr. Johnson with the entire Policy, that claim is patently false.

Respectfully submitted,

ZASHIN & RICH CO., L.P.A.

/s/ Stephen S. Zashin

Stephen S. Zashin

SSZ/cmh
Attachments
cc: Plaintiff
Defendants

